IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No. 127 of 1996
Date of decision 29.10.2007

Commissioner of Income Tax Patiala .. Appellant

Versus

Polycast Spun Pipes .. Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

PRESENT: Mr.S.K.Garg Narwana, Advocate for the appellant

M.M.Kumar, J.

At the instance of the Revenue, the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for brevity 'the Tribunal') while exercising jurisdiction under Section 256(1) of the Income Tax Act, 1961 (for brevity 'the Act') has referred the following question of law for determination of this Court which is stated to have arisen from ITA No. 486 of 1990 in respect of assessment year 1979-80:

> " Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the penalty u/s 271(1) (c) was to be calculated in relation to the tax on the income finally assessed (after giving appeal effect) and not with reference to the tax on the income concealed by the assessee ?"

The facts as stated by the Tribunal are that the assessee- firm is engaged in the business of manufacture and sale of RCC Spun pipes and was assessed on a higher income by the Assessing Officer. The assessee had filed its return showing loss of Rs. 1,54,360/- and the Assessing Officer made an addition of Rs. 2,24,214/- on account of four cash credit entries. These entries were held to be not genuine and certain additions were also

made on account of low gross profit shown by the assessee. Even some disallowance's were further made in respect of travelling expenses, car expenses and interest payable to partners. Thus the income was assessed on a positive figure of Rs. 98,530/-. A notice under Section 271(1)(c) of the Act was issued to the assessee on the plea that it had concealed the particulars of its income and the Assessing Officer held the assessee guilty of concealment for the amount of Rs. 2,24,140/- which represented the four cash credits and accordingly addition had been made under Section 68 of the Act. The Assessing Officer calculated the penalty on the amount of income concealed at Rs. 2,24,140/- although the tax sought to be evaded on the above income was Rs. 1,30,740/-. The assessee went in appeal against the levy as well as calculation of amount of penalty. The first appellate authority upheld the levy of penalty on the ground that the assessee had concealed income represented by three cash credits totaling Rs. 2,14,000/-. The fourth amount of cash credit in the name of M/s Himachal Rang Udyog at Rs. 10,140/- was not taken into account for the reason that the matter had been restored to the file of the Assessing Officer for the purposes of verification. The Appellate Authority reduced the amount of penalty to that extent treating the concealment of income at Rs. 2,14,000/-.

The assessee carried the matter in appeal before the Tribunal challenging the penalty as well as calculation. The assessee argued that it could not be held guilty of concealment in relation to cash credit merely because its explanation had been rejected. The Tribunal considered the question in detail and held that the assessee was guilty of concealment to the extent of Rs. 2,14,000/-. However, the calculation of the amount of penalty was found to be not in accordance with law. The assessee was found to have

filed the return declaring loss at Rs. 1,54,360/- whereas income had been finally determined after giving appeal effect to the Tribunal's order at Rs.62,651/- subject to verification in respect of the fourth cash credit entry of Rs. 10,140/-. For the afore-mentioned view, the Tribunal had placed reliance on various judgements including CIT v. Prithipal Singh and Co. (1990) 183 ITR 69(P&H) and G.C.Agarwal v. Commissioner of Income Tax (1990) 197 ITR 571 (SC). The Tribunal accordingly took the view that the penalty has to be calculated only in relation to the income which has been finally determined after giving appeal effect to the order passed by the Tribunal and not on the total income of Rs. 2,14,000/- representing three cash credit entries which were held to be concealed income of the assessee. The Tribunal was further of the view that for the purposes of calculation of penalty difference between tax amount shown in the return and the tax on the income assessed was required to be taken as the amount of tax sought to be avoided/ evaded. It was in the afore-mentioned facts that the question of law has been referred for the opinion of this Court.

The matter is no longer res-integra. In the case of Virtual Soft Systems Ltd. v. Commissioner of Income Tax (2007) 289 ITR 83, their Lordships of Hon'ble the Supreme Court while interpreting the provisions of Section 271(1)(c) read with Clause 3 Explanation 4 of the Act observed as under:

> " Explanation 4 to section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002 requires to be carefully compared with the said Explanation as amended by the Finance Act,2002. The comparison of the Explanation as it stood before 2002 and after 2002 by itself shows clearly that it is only after

> the amendment made by the Finance Act,2002, that the Explanation dealt with the situation of an assessee having returned a loss and where, even after addition of concealed income by the assessee, the end result was still an assessed loss. This situation was not dealt with at all by the Explanation to section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002. Further, the plain reading of clause (a) of Explanation 4 to Section 271 as it stood prior to the 2002 amendment, shows that this clause applied to a situation where an assessee has returned a loss which by reason of the addition of the concealed income thereto by the Assessing Officer, is converted into a positive figure of the assessed income on which the assessee is required to pay tax. In contrast clause (c) of the said Explanation 4 applies only to a situation where the assessee has returned a positive income, which stands enhanced by reason of the concealed income added thereto by the Assessing Officer in the assessment order. Consequently, both under clause (a) and clause (c) of the said Explanation 4, the assessee can be penalized only if he has a positive assessed income on which tax is payable. The only difference between clause (a) and clause (c) is that clause (a) applied to an assessee who had filed a loss return, and clause (c) to an assessee who has filed a positive return.....”

When the facts of the present case are considered in the light of the afore-mentioned principles laid down by Hon'ble the Supreme Court it has to be concluded that the order of the Tribunal has to be upheld as it has

opined that the penalty has to be calculated only in relation to the income which was been finally determined after giving appeal effect to the order passed by the Tribunal and not on the total amount of Rs.2,14,000/- representing three cash credit entries which were held to be concealed income of the assessee. Accordingly, the afore-mentioned question is answered against the Revenue and in favour of the assessee.

The reference stands disposed of.

(M.M.Kumar)
Judge

(Ajay Kumar Mittal)
Judge

29.10.2007
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